1987

# David R. Williams dba Industrial Communcations v. The Mountaing States Telephone and Telegraph Company, Public Service Comission of Utah, Brian T. Stewart, Brent H. Cameron, and James M. Byrne : Brief of Petitioner

Utah Supreme Court


Ted D. Smith; David L. Stott; Attorney for Respondent.
Keith E. Taylor; Michael L. Larsen; Parsons, Behle, and Latimer; Attorneys for Petitioner.

870219

IN THE SUPREME COURT OF THE STATE OF UTAH

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| DAVID R. WILLIAMS d/b/a INDUSTRIAL COMMUNICATIONS,<br><br>Petitioner,<br><br>vs.<br><br>THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY and PUBLIC SERVICE COMMISSION OF UTAH: BRIAN T. STEWART, Chairman; BRENT H. CAMERON, Commissioner; JAMES M. BYRNE, Commissioner,<br><br>Respondents. | Case No. 870219 |

# BRIEF OF PETITIONER

ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF UTAH TO THE UTAH PUBLIC SERVICE COMMISSION


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## LIST OF ALL PARTIES

In addition to the parties listed in the caption, Daniels and Associates intervened in the hearing before the Public Service Commission. Daniels is represented by John C. Heaton, Esq., Prince, Yeates & Geldzahler, Attorneys at Law, City Centre I, Suite 900, 171 East 400 South, Salt Lake City, Utah 84111. U.S. West NewVector Group, Inc. also filed a Motion to Intervene but did not participate in the hearing before the Commission. NewVector is represented by Gregory B. Monson, Esq., Watkiss & Campbell, Attorneys at Law, 310 South Main Street, Suite 1200, Salt Lake City, Utah 84101. In addition, the Division of Public Utilities was represented by Brian W. Burnett, Esq., Assistant Attorney General, 130 State Capitol Building, Salt Lake City, Utah 84114.

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STATUTORY AUTHORITIES

## STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether the Public Service Commission failed to properly consider each of the factors mandated by the Legislature in Utah Code Ann. § 54-8b-3(2), in reaching its decision to detariff rate levels for mobile telephone service.

II. Whether the Public Service Commission erred by basing findings of fact solely on the testimony of Mr. James H. Murphy which lacked any proper foundation and included speculation and hearsay.

III. Whether findings of fact Nos. 2, 3, 5, 6, 7, 8, 9, 10, 14, 15 and 16 are unsupported by the record and are erroneous as a matter of law.

## STATEMENT OF THE CASE

This appeal is taken from a decision of the Utah Public Service Commission issued on April 17, 1987 granting in part, and denying in part, a petition by Mountain Bell seeking partial deregulation of mobile and rural radio services under Utah Code Ann. § 54-8b-1 et seq. The Commission by its Report and Order detariffed mobile radio service and exempted the suppliers of such services from the requirement of seeking prior approval for rate changes. It denied, however, similar requests regarding rural radio service. Petitioner herein filed a Petition for Review and Rehearing which was deemed denied due to Commission

inaction. The matter is now before the Court pursuant to Industrial's Petition for Review filed on June 23, 1987.

## STATEMENT OF FACTS

On August 9, 1985, The Mountain States Telephone and Telegraph Company (Mountain Bell) filed a petition with the Utah Public Service Commission (the "Commission") seeking an order exempting it completely from regulation with regard to mobile radio service and rural radio service.[1] The petition was filed pursuant to Utah Code Ann. §§ 54-8b-1 et seq. and was assigned Case No. 85-049-09. In support of its petition, Mountain Bell prefiled the direct testimony and exhibits of James H. Murphy at the time the petition was filed.

On August 19, 1985, NewVector Communications, Inc. ("NewVector") filed a Motion to Intervene.[2] On August 20, 1985, David R. Williams d/b/a Industrial Communications ("Industrial") filed a Notice of Intervention and Protest. On August 23, 1985,

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1 In its Petition to the Commission, Mountain Bell defines mobile radio service as ". . . a communication service furnished through a mobile telephone service base station between a wire line telephone and a mobile telephone unit or between two mobile units." Rural radio service is defined as " . . . a communication service furnished through a mobile telephone base station or central office station between a rural customer station and a wire line telephone, between a rural customer station and a mobile unit, or between two rural customer stations." (R. at 465-66).

2 NewVector later changed its name to U.S. West NewVector Group, Inc.

Mobile Telephone, Inc. ("Mobile") filed a Notice of Intervention and Protest.[3]

On January 9, 1986, Mountain Bell and the Utah Division of Public Utilities (the "Division") filed a joint motion for a continuance on the ground that Mountain Bell had not completed development and implementation of an accounting system to separate regulated services from unregulated services. (R. at 673.) The hearing date which had previously been set for March 4, 1986 was vacated and a further Prehearing Conference was set for August 5, 1986. (R. at 685.)

At the Prehearing Conference on August 5, 1986, Mountain Bell indicated that, in light of the fact that its accounting system still had not been fully implemented, it was changing its request for relief in this matter from full exemption from all regulation by the Commission to a request that the Commission detariff the rate levels for fixed rural and mobile radio services. (R. at 692-93.) The Commission concluded that Mountain Bell did not need to file a new petition since the detariffing of rate levels was contemplated by the original petition. (R. at 693.) A Commission hearing was scheduled for November, 1986.

In a Prehearing Conference in September, 1985, the Commission concluded that Mountain Bell's petition should be treated as a generic proceeding to consider the effects of possible

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3 Mobile was later acquired by Daniels & Associates.

deregulation on other related companies. The Commission therefore assigned the petition a generic docket number, Case No. 85-999-19, and ordered that all other providers of rural and mobile radio services in Utah be notified of the proceeding. (R. at 487.)

Hearings in the consolidated proceedings were held by the Commission on November 13 and 14, 1986 and on January 20, 1987. Mountain Bell presented only one direct witness in support of its petition, Mr. James H. Murphy. Over repeated objections and motions to strike made by Industrial's counsel, the Commission entertained the testimony and exhibits of Mr. Murphy. (R. at 21, 58, 61-3, 94, 117.) In commenting on the "hearsay" aspect of Mr. Murphy's testimony, Commissioner Cameron stated: "Hearsay evidence is admissible in Utah administrative hearings. It cannot be relied on solely for findings of fact or conclusion by the Commission." (R. at 29-30.) Division witnesses Mr. Robert Capshaw and Dr. George R. Compton admitted before the Commission that their testimony was based in part on the testimony of Mr. Murphy. (R. at 160, 187-88.) Mr. Murphy admitted that his testimony and exhibits contained facts obtained from a third party source, about which he had no personal knowledge. (R. at 51-53.) Final arguments were heard by the Commission on January 20, 1987.

On April 17, 1987, the Commission issued its Report and Order in consolidated cases 87-049-09 and 85-999-19. The Order of the Commission stated:

> 1. Effective immediately, regulated suppliers of mobile telephone service in the following cities and surrounding areas, may remove rate levels from their tariffs:
>
> | | |
> |---|---|
> | Moab | Monticello |
> | Ogden | Salt Lake City |
> | Provo | Price |
> | Vernal | |
>
> Such suppliers need not seek prior approval of changes in rates for mobile telephone service.
>
> 2. Rate levels for rural radio service shall continue to be tariffed and subject to all regulatory requirements of Title 54.

(R. at 582-83.) (A copy of the Report and Order is attached hereto as Appendix "A".) Industrial filed its Petition for Review and Rehearing with the Commission on May 5, 1987. (R. at 537.) (A copy of the Petition for Review and Rehearing is attached hereto as Appendix "B".) The Commission took no action concerning the Petition for Review and Rehearing during the time period specified in Utah Code Ann. § 54-7-15, and so it is deemed denied. Industrial filed its Petition for Review with this Court on June 23, 1987. (R. at 561.)

## SUMMARY OF THE ARGUMENT

The Commission concluded in its Report and Order dated April 17, 1987, that it was not required to consider each of the factors (a) through (k) as set forth by the Legislature in Utah Code Ann. § 54-8b-3(2). In fact, during the hearings before the Commission, no competent evidence whatsoever was introduced by Mountain Bell or any other party with regard to some of the

factors enumerated by the Legislature in § 54-8b-3(2). The Findings of Fact upon which the Commission based its decision to detariff rate levels of mobile telephone service providers in the seven cities listed in the Commission's Order were based solely upon hearsay evidence and upon unsubstantiated conclusions drawn by witnesses and by the Commission itself. As such the Commission's Findings of Fact were inadequate as a matter of law, and the Commission's Order is invalid under the requirements of the statute.

In the hearings held by the Commission on this matter on November 13 and 14, 1986 and on January 20, 1987, the Commission allowed Mountain Bell to present prefiled and direct testimony of Mr. James H. Murphy. Mr. Murphy's testimony was admittedly based upon facts of which he had no personal knowledge and as to which he was incompetent to testify. Over petitioner's repeated objections and motions to strike, the Commission heard and considered Mr. Murphy's testimony despite its lack of foundation and despite the fact that it was clearly hearsay. The Commission then relied solely upon Mr. Murphy's hearsay testimony in making Findings of Fact upon which it based its decision to detariff mobile radio service rate levels.

In addition, the testimony presented by Division witnesses, Robert Capshaw and George R. Compton, contained hearsay, was without foundation, and was based at least in part upon the incompetent hearsay testimony of Mr. Murphy. As a result, the

Commission's ultimate Findings of Fact and decision to allow mobile telephone service providers to remove rate levels from their tariffs were based solely upon incompetent, hearsay testimony and are invalid as a matter of law.

Finally, several of the Commission's Finding of Facts were either based on incompetent evidence or are wholly devoid of any support in the record. Because these facts are unsupported by the record, they are erroneous as a matter of law. Thus the Commission's Report and Order based upon these unsupported findings and conclusions is invalid.

## ARGUMENT

### I.

### THE COMMISSION'S REPORT AND ORDER IS INVALID BECAUSE THE COMMISSION FAILED TO FOLLOW THE PROCEDURE ESTABLISHED BY THE LEGISLATURE FOR PARTIALLY OR WHOLLY EXEMPTING PUBLIC TELECOMMUNICATION SERVICE PROVIDERS FROM REGULATION.

**A.** The Commission Failed to Consider and Make Findings of Fact Regarding Relevant Factors Mandated by the Legislature for Consideration in § 54-8b-3(2).

In 1985 the Utah Legislature passed Utah Code Ann. § 54-8b-3, which gives the Commission jurisdiction and power to partially or wholly exempt any telecommunications corporation or public telecommunication services from any requirement of Title 54. Section 54-8b-3 states in relevant part:

> (1) The commission is vested with power and jurisdiction to partially or wholly exempt from any requirement of this title any

telecommunications corporation or public telecommunications service in this state.

(2) The commission, on its own initiative or in response to an application by a telecommunications corporation or a user of a public telecommunications service, may, after public notice and an opportunity for a hearing, make findings and issue an order specifying its requirements, terms, and conditions exempting any telecommunications corporation or any public telecommunications service from any requirement of this title either for a specific geographic area or in the entire state if the commission finds that the telecommunications corporation or service is subject to effective competition, that customers of the telecommunications corporation or service have reasonably available alternatives, and that the telecommunications corporation or service does not serve a captive customer base, and if such exemption is in the public interest of the citizens of the state. In determining whether to exempt any telecommunications corporation or public telecommunications service from any requirement of this title, the commission shall consider all relevant factors including, but not limited to: (a) the number of other providers offering similar services; (b) the intrastate market power and market share within the state of Utah of the telecommunications corporation requesting an exemption; (c) the intrastate market power and market share of other providers; (d) the existence of other providers to make functionally equivalent services readily available at competitive rates, terms, and conditions; (e) the effect of exemption on the regulated revenue requirements of the telecommunications corporation requesting an exemption; (f) the ease of entry of other providers into the marketplace; (g) the overall impact of exemption on the public interest; (h) the integrity of all service providers in the proposed market; (i) the cost of providing such service; (j) the economic impact on existing telecommunications corporations; and (k) whether competition will promote the provision of

> adequate services at just and reasonable rates.

Utah Code Ann. § 54-8b-3 (1985) (emphasis added).

The language of Section 54-8b-3 makes it clear that the Legislature, in enacting the statute, did not intend to vest the Commission with unrestricted authority to partially or wholly exempt public telecommunication services from the requirements of Title 54. Rather, its intent was to establish a procedure which, when correctly followed, would allow the Commission to grant exemptions under certain circumstances.

In the hearings before the Commission no competent evidence was introduced either by Mountain Bell or by the Division regarding a number of the factors that "shall" be considered under Subsection (2)(a) through (k) of § 54-8b-3. As a result the Commission has ignored the procedure established by the Legislature and its Report and Order issued April 17, 1987 is invalid.

For example, "relevant factor" (i), "the cost of providing such service," is critical in this case because Mountain Bell's Petition seeks removal of rate levels from the pricing of its services. However, despite the fact that Mountain Bell's witness had available cost studies which he could have presented to the Commission, the Commission refused to require production of such evidence, finding instead that this particular factor was not relevant in this case. The Commission concluded,

"while costs may be a relevant factor in our ongoing oversight role, we do not believe it is necessary or relevant that we review specific cost data to determine whether exemption should be allowed. . . ." (R. at 531.) By substituting its wisdom for that of the Legislature in this manner, the Commission was clearly acting beyond the scope of its authority and in direct contravention of statutory requirements.

B. The Commission Improperly Interpreted the Language of § 54-8b-3(2).

In its Report and Order in this case, the Commission correctly pointed out that Section 54-8b-3(2):

> . . .sets forth four findings that the Commission must make to support an exemption from regulation for a service:
>
> 1. The service is subject to effective competition;
>
> 2. Customers of the service have reasonably available alternatives;
>
> 3. The service does not serve a captive customer base; and
>
> 4. Exemption is in the public interest.

(R. at 569.) However, the Report goes on to state:

> These are the only four issues upon which the Commission must make explicit findings. . . . By expressly requiring findings as to the four, but merely indicating that the others shall be considered, the Legislature is indicating its intent that the latter are to serve as a general guide of relevant questions to examine but is not necessarily indicating that all the criteria are necessarily relevant in a given case. Indeed, the

> statute indicates that other criteria in a given case may be relevant. One thing is completely clear: the Legislature is not requiring separate findings as to each of the factors.

(R. at 571.)

The position taken by the Commission is in direct opposition to the plain language of the statute. The statute reads, "In determining whether to exempt any telecommunications corporation or public telecommunication service from any requirement of this title, the Commission shall consider all relevant factors including but not limited to" those factors set forth in subparagraphs (a)-(k). Utah Code Ann. § 54-8b-3(2) (emphasis added). Although the Commission is not required to make specific findings of fact as to "all relevant factors" including those designated in subparagraphs (a)-(k), it "shall" consider them. Id. As a matter of law, it cannot and did not consider them when no evidence was submitted with respect to those matters. As noted above, Mountain Bell admitted that it had in its possession its "cost of providing such service" -- yet it failed to produce the same. (R. at 97-100.) Even worse, the Mountain Bell witness refused to disclose this information on cross-examination and the Commission refused, on appropriate request, to require him to answer questions eliciting those very facts. (R. at 97-100.)

Rather than follow the procedure established by the Legislature in §54-8b-3, the Commission concluded that " . . . examination of the additional factors demonstrates that it would

be virtually impossible to reduce some of them to factual testimony or to precise factual conclusions. . . . Thus, while the Commission needs to bear these factors in mind, there is no legal requirement to make explicit factual findings as to each." (R. at 572.) This blanket dismissal of the Legislative requirement that the Commission consider all of the relevant factors listed in §54-8b-3(2)(a)-(k) directly contradicts the plain language of the statute, and by so acting, the Commission has exceeded its authority and its Order in this case is invalid.

In Mountain States Legal Foundation v. Utah Public Service Commission, 636 P.2d 1047 (Utah 1981), this Court, in striking down a "senior citizen rate" approved by the Commission for establishing electric utility fees, stated the following:

> [I]f the Commission has not acted within the powers delegated to it by the Legislature, or there is no legal basis in fact for the findings of the Commission, or the findings do not rationally support proper legal conclusions, an order is contrary to law and must be set aside. Commission expertise alone is not an adequate basis upon which ultimate findings as to reasonableness of rates and classifications of customers may be based.
>
> It is, therefore, the responsibility of this Court to determine whether the Commission acted outside its jurisdiction, in excess of its lawful powers, or in a manner which is arbitrary and capricious and therefore without legal justification. (Citations omitted.)

Id. at 1051.

In the case at bar, the Commission has adopted an interpretation of § 54-8b-3 which is contrary to the plain language of that statute. The Commission has therefore acted "in excess of its lawful powers, . . . in a manner which is arbitrary and capricious and therefore without legal justification." Id.

In West Jordan v. Department of Employment Sec., 656 P.2d 411 (Utah 1982), a case involving an appeal taken to the State Industrial Commission regarding the right of a terminated employee to receive unemployment compensation benefits, this Court held that "agency decisions are still subject to judicial review and will be reversed when they are inconsistent with the governing legislation or the decisions of this Court." Id. at 412. Under the facts of the present case, the Commission has clearly acted in a manner inconsistent with the language of § 54-8b-3, and its Order should be invalidated.

C. Mountain Bell Failed to Offer, and the Commission Failed to Require Information Regarding the Factors Listed in § 54-8b-3(2)(a) through (k) Even When Such Information Was Admittedly In Mountain Bell's Possession.

On cross-examination before the Commission, Mountain Bell's witness, Mr. Murphy, admitted that he was aware of the revenue/cost relationship of Mountain Bell's radio services but declined to produce that information because it was "proprietary." (R. at 97-100.) Despite the Legislature's instruction in §54-8b-3(2)(i) that the Commission is to consider "the cost of

providing such service," the Commission failed to require, and Mountain Bell refused to present testimony regarding Mountain Bell's costs. (R. at 100-102.) This action by the Commission exemplifies its unwillingness to follow the procedure of §54-8b-3. By failing to require evidence on this and other "relevant factors," the Commission ignored the Legislature's requirements.

II.

THE COMMISSION'S REPORT AND ORDER WAS BASED SOLELY UPON HEARSAY EVIDENCE AND INCOMPETENT EVIDENCE.

A. The Testimony and Exhibits Offered in Support of Mountain Bell's Petition by Mr. Murphy Were Based Upon Hearsay and Facts of Which He Had No Personal Knowledge.

In Lakeshore Motor Coach Lines, Inc. v. Welling, 339 P.2d 1011, 1014 (Utah 1959), this Court held that hearsay testimony is admissible in proceedings before the Public Service Commission. However, in so holding this Court also stated that "a finding of fact cannot be based solely on hearsay evidence, but it must be 'supported by a residuum of legal evidence competent in a court of law.'" Id. See also, Sandy State Bank v. Brimhall, 636 P.2d 481, 486 (Utah 1981) (in a hearing before a Utah Bank Commissioner hearsay evidence was admissible, however, finding of fact could not be based solely upon hearsay evidence unless the finding was supported "by a residuum of legal evidence competent in a court of law."); Yacht Club v. Utah Liquor Control

Commission, 681 P.2d 1224, 1226 (Utah 1984) ("hearsay evidence is admissible in proceedings before administrative agencies. However, findings of fact cannot be based exclusively on hearsay evidence. They must be supported by a residuum of legal evidence competent in a court of law.").

In the hearings held before the Commission, evidence was introduced by Mr. Murphy, in the form of a chart which purportedly gives a percentage of the market share held by various carriers as a function of the number of radio channels held by those companies. (R. at 757.) Mr. Murphy was called not as an expert, but as a fact witness. As such he was competent to testify only as to facts of which he had personal knowledge. Utah R. Evid. 602. Mr. Murphy admitted before the Commission that he had no personal knowledge of the percentages and figures contained in the exhibit. (R. at 52.) In addition, Mr. Murphy testified that he did not have any personal knowledge as to which, if any, of the channels listed in the exhibit were being utilized by the corresponding service providers. (R. at 52, 53.)

Because Mr. Murphy's oral and documentary testimony as to market share and number of channels was based upon facts of which he had no personal knowledge, his testimony was presented to the Commission without adequate foundation. In addition, Mr. Murphy admitted that his information was obtained from a third party source. (R. at 51-52.) As such, his testimony was hearsay and was inadmissible. It was error for the Commission to base

its findings of fact regarding adequate competition solely upon Mr. Murphy's testimony.

B. No Competent Evidence was Presented to the Commission Upon Which it Could Base its Report and Order or Findings of Fact.

Utah Code Ann. § 54-8b-3(2) requires, among other things, that the Commission, in wholly or partially exempting telecommunications service from the requirements of Title 54, make findings of fact "that the telecommunications corporation or service is subject to a effective competition, [and] that customers of the telecommunications corporation or service have reasonably available alternatives." Id. In the case at bar, the only witness before the Commission for Mountain Bell to testify regarding competition, market share and available alternatives was Mr. Murphy. Because Mr. Murphy's testimony regarding these items was admittedly based upon facts as to which he had no personal knowledge, the Commission had no "legally competent evidence" before it upon which it could base its factual findings. 339 P.2d at 1014. As a result, the Commission's Findings of Fact were based solely on hearsay evidence, unsupported by a "residuum of legal evidence competent in a court of law." Id.

C. The Testimony of Division Witnesses Robert Capshaw and George R. Compton was Based Upon the Hearsay Testimony of Mr. James H. Murphy.

During cross-examination before the Commission, Division witness Dr. George R. Compton admitted that in formulating his opinion as to facts presented in the proceeding he had relied upon documents provided by Mr. Murphy. As stated above, Mr. Murphy's testimony, and in particular his documentary evidence regarding market shares was hearsay evidence and cannot be the sole basis for findings by the Commission. (R. at 204.) In addition, Division witness Mr. Robert Capshaw admitted on cross-examination that in preparing his testimony he had before him the testimony of Mountain Bell, which consisted of the documentary evidence of Mr. Murphy and his prefiled testimony. (R. at 160.)

It is clear from the above admissions that the testimony of both Dr. Compton and Mr. Capshaw before the Commission was based upon the hearsay testimony of Mr. Murphy. Therefore, it cannot be said that the Commission had before it legally competent evidence aside from the hearsay testimony of Mr. Murphy upon which it could base its Findings of Fact regarding effective competition and availability of other carriers. As a result, under the standard enunciated by this Court, the Commission's Findings of Fact were not based upon a residuum of competent evidence and are invalid.

III. THE COMMISSIONS FINDING OF FACT, NO. 2, 3, 5, 6, 7, 8, 9, 10, 14, 15 AND 16 ARE NOT FACTUALLY SUPPORTED BY THE RECORD AND ARE ERRONEOUS AS A MATTER OF LAW.

In Mountain States Legal Foundation, supra, this Court stated:

> For this Court to sustain an order, the findings must be sufficiently detailed to demonstrate that the Commission has properly arrived at the ultimate factual findings and has properly applied the governing rules of law to those findings. Ultimate findings as to reasonableness and discrimination must be sustained if there are adequate subordinate findings to support them, and there is substantial evidence to support the findings.

636 P.2d at 1052.

In the present case, the Commission did not "properly arrive at [its] ultimate factual findings . . ." and its findings are not supported by "adequate subordinate findings. . . ." Id. Thus, the Commission's Report and Order are invalid as a matter of law.

In its Report and Order, Commission Finding of Fact No. 2 states that "several types of entities offer functionally equivalent types of mobile radio service." (R. at 573) (emphasis added). A central underpinning finding of this paragraph is that "specialized mobile radio (SMR) providers" offer a "functionally equivalent" service. Section 54-8b-3(2)(d) defines a "functionally equivalent" service to include those "available at competitive rates, terms, and conditions." The only evidence upon which this Finding of Fact could be premised is the incompetent

testimony of Mr. Murphy. Mr. Murphy admitted that he had no knowledge of information relating to either the identity of or the services offered by any SMR offering a service in the State of Utah. The findings as to each of the designated areas that SMR's offer a "functionally equivalent" service are erroneous on their face. The record is absolutely barren of any evidence upon which the necessary further examination could be made to ascertain whether or not such services were "readily available at competitive rates, terms and conditions." Id. Indeed, there is no evidence on this record relating to their rates and the uncontroverted evidence demonstrates that their terms and conditions of service are completely different. In fact, SMR's are not even regulated by the Commission.

Similarly, the statement in Finding of Fact No. 3, that SMR providers in Salt Lake City offer "functionally equivalent" mobile services is erroneous as a matter of law. The additional critical finding made here by the Commission that "NewVector" and "Salt Lake City Cellular" also offer a "functionally equivalent" service is without support in the record. (R. at 525.)

Similarly, Finding of Fact No. 5 (R. at 526) that "in the Ogden area, functionally equivalent mobile radio services offered to the public by Mountain Bell, Daniels, Industrial, NewVector, Salt Lake City Cellular and at least one SMR" is not supported by the record.

Each of the Findings of Fact contained in paragraph 6 (R. at 526) is similarly erroneous, not supported by evidence, and contrary to the uncontroverted evidence. As a matter of fact, Mountain Bell has 100% of the Ogden market. It has a captive customer base. Customers have no competitive alternative available to them whatsoever. Although Industrial has authority from this Commission to serve this area, it cannot do so competitively because customers in Ogden desiring to call mobile units in Ogden have to pay a long-distance charge when dealing with Industrial which is not true with Mountain Bell. This explains why Mountain Bell has 100% of the market. No other service is competitive at all. (R. at 241.)

Finding of Fact No. 7 (R. at 641-42) is similarly erroneous. In the Provo area, Mountain Bell has 100% of the market because none of the regulated characters can offer a complete service without imposing a long-distance charge. Thus, Mountain Bell services a captive customer base with no reasonable alternative service available in the Provo area. (R. at 235, 238.)

The Findings of Fact contained in paragraph 9 (R. at 642) are erroneous in that they find that SMR's in the Vernal area offer a "functionally equivalent" service and that mobile radio services are subject to effective competition in that area. (R. at 642.) Industrial is the only arguable competitor of Mountain Bell in the Vernal area. However, it is uncontroverted that Mountain Bell has a distinct and unfair competitive advantage in

Vernal because all of its services are automated and the Industrial competitive service is manual. Industrial could convert its service to a competitive automated service, but only with the cooperation of Mountain Bell, which to date has been refused. (R. at 291-93.)

Similarly, the Findings of Fact set forth in paragraph 10 (R. at 576-77) are wholly unsupported by evidence and contrary to the uncontroverted evidence with respect to services available in the Vernal area. The same is true of the Findings of Fact contained in paragraph 14 (R. at 577-78) regarding the Moab and Montecello areas.

Findings of Fact No. 15 (R. at 578) contain numerous erroneous findings which duplicate those already addressed above. By way of illustration, but not of exclusion, we invite the attention of the Court to specific findings set forth in paragraph 15, not heretofore addressed, which are wholly erroneous on this record as a matter of law:

(a) The statement that "there is no evidence that Mountain Bell has the kind of market power that would allow it to dictate whatever price it chooses" (R. at 578) is wholly erroneous. This Finding of Fact is of specific importance because the second full paragraph of subsection (2) of Utah Code Ann. § 54-8b-3 mandates the consideration of these very factors. Division witness, Mr. Capshaw conceded on cross-examination that Mountain Bell and Cellular, (a sister company) could have the

staying power to set rates where they could get rid of both Mobile and Industrial and have the entire market to themselves. (R. at 148.)

(b) The statements contained in paragraph 15 (R. at 578-79) to the effect that no one entity dominates market share or has market power demonstrated by the number of customers served are erroneous. These statements generalize Mobile radio service throughout the state of Utah. This simply cannot be done because of the local nature of the markets. (R. at 249.) These statements are not supported by any evidence whatsoever with respect to many of the service areas in the State of Utah where only a single provider of service is available.

In Finding of Fact No. 15(e) the Commission states that there is no prohibitive financial burden to entry into the market. (R. at 579.) This statement is unsupported by evidence in the record and is contrary to other uncontroverted evidence contained in the record. For example, Mr. Capshaw testified that it would cost tens of thousands of dollars to enter the market in the local rural areas and that, in his opinion, there will never be competition in small towns because of the small volume of customers and the difficulty with terrain. (R. at 142, 152.) Dr. Compton testified that it would cost hundreds of thousands of dollars to enter the marketplace in Salt Lake City. (R. at 222.)

Finally, Finding of Fact No. 16 (R. at 581) is in fact a conclusion of law. As such, it is erroneous as a matter of law.

In summary, each of the Findings of Fact listed above fails to meet the standard enunciated by this court in Mountain States Legal Foundation and should be vacated by this Court.

## CONCLUSION

For the reasons set forth above, the Commission's Report and Order issued in consolidated case nos. 85-049-09 and 85-999-19 should be vacated.

RESPECTFULLY submitted this 28th day of September, 1987.

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MAILING CERTIFICATE

I hereby certify that I caused to be served by registered mail, postage prepaid, four true and correct copies of the foregoing BRIEF OF PETITIONER ON WRIT OF CERTIORARI FROM THE SUPREME COURT OF UTAH TO THE UTAH PUBLIC SERVICE COMMISSION to the following on this 28th day of September, 1987:

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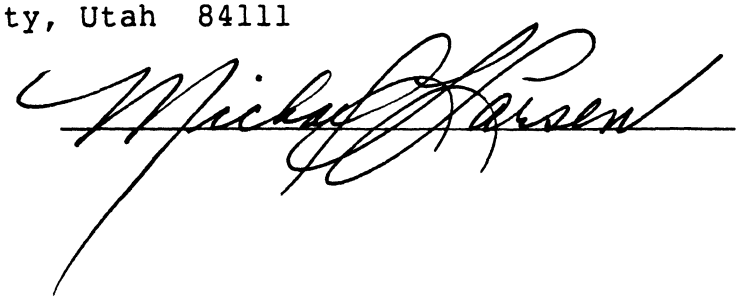

APPENDIX "A"

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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| | |
|---|---|
| In the Matter of the Petition of THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY for Exemption from Regulation of Mobile Radio Service and Rural Radio Service. | CASE NOS. 85-049-09<br>85-999-19<br><br>REPORT AND ORDER |

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ISSUED: April 17, 1987

Appearances:

| | | |
|---|---|---|
| Ted D. Smith | For | The Mountain States Telephone and Telegraph Company |
| Keith E. Taylor | " | David Williams, dba Industrial Communications |
| Jon C. Heaton | " | Daniels and Associates |
| Gregory B. Monson | " | U S West NewVector Group, Inc. |
| Brian W. Burnett, Assistant Attorney General | " | Division of Public Utilities, Department of Business Regulation, State of Utah |

By the Commission:

## BACKGROUND

This matter was initiated on August 9, 1985 by a Petition filed by The Mountain States Telephone & Telegraph Company (Mountain Bell) seeking an order exempting it from regulation with regard to Mobile Radio Service and Rural Radio Service. The Petition was filed pursuant to Utah Code Ann. §§ 54-8b-1 et seq. The docket was assigned Case No. 85-049-09. Mountain Bell prefiled the direct testimony and exhibits of James

H. Murphy at the time the Petition was filed. On August 19, 1985, NewVector Communications, Inc. filed a Motion to Intervene. NewVector later changed its name to U S West NewVector Group, Inc. (NewVector). On August 20, 1985, David R. Williams dba Industrial Communications (Industrial) filed a Notice of Intervention and Protest. On August 23, 1985 Mobile Telephone, Inc. (Mobile) filed a Notice of Intervention and Protest. Mobile was later acquired by Daniels and Associates (Daniels). In a Prehearing Conference in September, 1985, the Commission concluded that this matter should be treated as a generic proceeding so that the deregulation of radio services of other companies in Utah could be considered. Therefore, it was assigned Case No. 85-999-19, a generic docket number. Hearing dates were established for March 4, 1986, and the Division was ordered to notify all other providers of rural and mobile radio services in the State of Utah of the proceeding.

On January 9, 1986, Mountain Bell and the Division filed a joint motion for a continuance on the ground that Mountain Bell had not completed development and implementation of an accounting system to separate regulated from unregulated services. The hearing date was vacated and a further Prehearing Conference was set for August 5, 1986.

At the Prehearing Conference on August 5, 1986, Mountain Bell indicated that, in light of the fact that its accounting system still had not been fully implemented, it was changing its request for relief in this matter from full exemption from

all regulation by the Commission to a request that the Commission merely detariff the rate levels for fixed rural and mobile radio services. The Commission concluded that Mountain Bell did not need to file a new petition since the detariffing of rate levels was contemplated by the original petition. A hearing was scheduled for November, 1986.

Hearings were held on November 13 and 14, 1986 and on January 20, 1987. Mountain Bell presented the direct testimony of Mr. James H. Murphy. The Division presented the direct testimony of Mr. Robert Capshaw and Dr. George Compton. Industrial presented the testimony of Mr. David Williams. Daniels presented evidence by way of proffer which was received without objection. Later in the proceeding, Mountain Bell presented rebuttal testimony by Mr. Larry Fuller and Mr. Murphy. The Division presented additional testimony of Mr. Capshaw and Industrial presented rebuttal testimony of Mr. Williams. Final argument was presented to the Commission on January 20, 1986.

## GENERAL DISCUSSION

This case presents the first opportunity for the Commission comprehensively to construe and apply the provisions of Utah Code Ann. §§ 54-8b-1 et. seq., the statute enacted by the Utah Legislature in 1985, which authorizes us to exempt certain telecommunication services or companies from regulation.

The issue before us in this proceeding is whether the record supports the detariffing of rate levels for mobile and rural radio services. It is our conclusion that the facts before

us support the detariffing of rates for mobile service in the following cities and their surrounding areas: Moab, Monticello, Ogden, Salt Lake City, Provo, Price and Vernal. The record does not support the detariffing of rates for rural radio services at this time.

Section 54-8b-3 of the statutes states:

> (1) The commission is vested with power and jurisdiction to partially or wholly exempt from any requirement of this title any telecommunications corporation or public telecommunications service in this state.
>
> (2) The commission, on its own initiative or in response to an application by a telecommunications corporation or a user of a public telecommunications service, may, after public notice and an opportunity for a hearing, make findings and issue an order specifying its requirements, terms, and conditions exempting any telecommunications corporation or any public telecommunications service from any requirement of this title either for a specific geographic area or in the entire state if the Commission finds that the telecommunications corporation or service is subject to effective competition, that customers of the telecommunications corporation or service have reasonably available alternatives, and that the telecommunications corporation or service does not serve a captive customer base, and if such exemption is in the public interest of the citizens of the state.
>
> In determining whether to exempt any telecommunications corporation or public telecommunications service from any requirement of this title, the commission shall consider all relevant factors including, but not limited to: (a) the number of other providers offering similar services; (b) the intrastate market power and market share within the state of Utah of the telecommunications corporation requesting an exemption; (c) the intrastate market power and market share of other providers; (d) the existence of other providers to make

> functionally equivalent services readily available at competitive rates, terms, and conditions; (e) the effect of exemption on the regulated revenue requirements of the telecommunications corporation requesting an exemption; (f) the ease of entry of other providers into the marketplace; (g) the overall impact of exemption on the public interest; (h) the integrity of all service providers in the proposed market; (i) the cost of providing such service; (j) the economic impact on existing telecommunications corporation; and (k) whether competition will promote the provision of adequate services at just and reasonable rates.

Subsection (1) establishes the authority of the Commission to exempt wholly or in part any requirement of Title 54. Such exemption can range from total exemption of every requirement of Title 54 (in effect, total deregulation of a Company or service) to exempting specific requirements of the law, in which case the utility or service will remain subject to all other requirements of the law. In this case, we are presented with a petition to exempt from regulation the requirement to file and gain prior approval for price levels for mobile and rural radio services. Even if the Petition is granted, the services will remain subject to regulation as to quality, safety, facilities, and other non-price conditions of service; in the case of telephone corporations (like Mountain Bell) that provide other regulated services, rate base, expenses and revenues of mobile telephone service will continue to be included in ratemaking.

The telecommunications industry is changing rapidly and dramatically through technological change as well as through judicial, administrative, and statutory activity on both a state

and federal level. That the Legislature intended the statue to be a flexible tool is evidenced by Section 54-8b-7:

> The commission shall retain continuous jurisdiction over every telecommunications corporation or public telecommunications service exempted under this chapter and may exercise any statutory grant of power pertaining thereto, including the power to revoke or modify any order approving an exemption from regulation. The commission, may, after notice and hearing, revoke or modify an order approving exemption, if after considering the factors in Subsection 54-8b-3(2), the commission finds such modification or revocation to be in the public interest.

(Emphasis added). Under this section, no exemption order is final in the sense that the Commission is precluded from revoking it. The Commission has the authority to continue to monitor developments in a particular market and, if necessary, can re-regulate a service. This, as well as the fact that the Commission can allow exemption subject to "requirements, terms, and conditions," (§54-8b-3(2)) is clearly indicative of a legislative intent that the statute be a flexible tool for the Commission to use.

Section 54-8b-3(2) sets forth four findings that the Commission must make to support an exemption from regulation for a service:

1. The service is subject to effective competition;

2. Customers of the service have reasonably available alternatives;

3. The service does not serve a captive customer base; and

4. Exemption is in the public interest.

Each criterion has words that are not otherwise defined. For example: What is "effective" competition? What is a "reasonably available alternative"? What is a "captive customer base"? What is the definition of the public interest? The Commission has obviously been granted substantial discretion to define these terms in the context of a particular set of facts. We do not intend to attempt to define these terms in the abstract -- by their nature they cannot be so defined in the absence of specific facts to test them against.

In addition to the four criteria, Section 54-8b-3(2) contains additional matters for the Commission's consideration. The relevant portion states:

> In determining whether to exempt any telecommunications corporation or public telecommunications service from any requirement of this title, the commission shall consider all relevant factors including, but not limited to: (a) the number of other providers offering similar services; (b) the intrastate market power and market share within the state of Utah of the telecommunications corporation requesting an exemption; (c) the intrastate market power and market share of other providers; (d) the existence of other providers to make functionally equivalent services readily available at competitive rates, terms, and conditions; (e) the effect of exemption on the regulated revenue requirements of the telecommunications corporation requesting an exemption; (f) the ease of entry of other providers into the marketplace; (g) the overall impact of exemption on the public interest; (h) the integrity of all service providers in the proposed market; (i) the cost of providing such service; (j) the economic impact on existing telecommunications corporations; and (k) whether competition will promote the provision of adequate services at just and reasonable rates.

(Emphasis added).

Industrial argued that specific factual evidence must be presented as to each of the items set forth above and that the Commission has a duty to make explicit factual findings as to each. This is an erroneous reading of the statute. The statute makes it clear that the Commission may exempt from regulation if it "finds" that the four essential criteria are met (i.e. effective competition, reasonably available alternatives, no captive customer base, exemption is in the public interest). These are the only four issues upon which the Commission must make explicit findings. The additional factors to be considered are not separate and apart from the four essential criteria. Indeed, it is obvious that they are included in the statute as factors that the Commission is to bear in mind in making its findings and conclusions as to the four essential criteria. If the position advanced by Industrial were correct, then the four essential criteria would be rendered essentially superfluous. By expressly requiring findings as to the four, but merely indicating that the others shall be considered, the Legislature is indicating its intent that the latter are to serve as a general guide of relevant questions to examine but is not necessarily indicating that all of the criteria are necessarily relevant in a given case. Indeed, the statute indicates that other criteria in a given case may be relevant. One thing is completely clear: the Legislature is not requiring separate findings as to each of the factors.

Furthermore, examination of the additional factors demonstrates that it would be virtually impossible to reduce some of them to factual testimony or to precise factual conclusions. Many of them are obviously general policy consideration that cannot be expressed in precise factual terms. Thus, while the Commission needs to bear these factors in mind, there is no legal requirement to make explicit factual findings as to each.

Industrial and Daniels claim that Mountain Bell failed to meet its burden of proof for exemption under the statute. The position of Industrial and Daniels in opposition to detariffing of rates is based on a reading of Section 54-8b-3 that is much too restrictive, both in terms of the letter and spirit of the law. The only facts Industrial and Daniels apparently believe should be considered in determining whether to grant an exemption from regulation are those presented by Mountain Bell. Even if this were not a generic proceeding, we would disagree with this argument. Proceedings under the statute may be commenced by the Commission, the Division, a telephone corporation or a consumer. No matter how the proceedings are commenced, it is the duty of the Commission to become fully advised so that it may act in the public interest. Therefore, we do not regard proceedings under the statute as placing a burden on any particular party. This is even more the case where, as here, we are engaging in a generic proceeding regarding the possible partial deregulation of all providers of the service. Our findings and conclusions may be based in the totality of the evidence presented to the Commission

by all parties, including that presented by the Division, Industrial and Daniels.

Industrial and Daniels attacked at some lengths the exhibits presented by Mr. Murphy to demonstrate the competitiveness of the marketplace. Mr. Murphy made it clear that much of the information in his exhibits was based on published sources which he, as an experienced manager in the mobile radio marketplace, believed were reliable. He acknowledged that he did not have personal knowledge concerning some of the information. Industrial and Daniels introduced evidence that certain of the numbers in the exhibit were incorrect. While this evidence demonstrated inaccuracies in Mr. Murphy's exhibits, it corroborated the intent and thrust of such exhibits. In its totality, the evidence in this matter shows that effective competition for mobile service does exist in the seven areas set forth above.

## FINDINGS OF FACT

1. Mobile radio service is a two-way communications service furnished through a base station between a wireline telephone and a mobile unit or between two mobile units.

2. Several types of entities offer functionally equivalent types of mobile radio service. These include Radio Communication Carriers (RCCs) such as Daniels and Industrial, Wireline Communications Carriers (WCCs) such as Mountain Bell and Continental Telephone, Specialized Mobile Radio (SMR) providers, Cellular Carriers such as NewVector and Salt Lake City Cellular, as well as owners of private systems. We note that intrastate

cellular telephone service, at least in the Salt Lake SMSA, will be free of all regulatory restraints as of September of this year pursuant to Section 54-2-30, Utah Code.

3. In the Salt Lake City area, functionally equivalent mobile radio service is offered by Mountain Bell, Industial, Daniels, some SMR providers, NewVector, and Salt Lake City Cellular. In Salt Lake City, Mountain Bell has six radio channels, Industrial has eleven and Daniels has ten. While there is not an exact correlation between radio channels and market share, there is a general relationship; the more radio channels, the more traffic that can be served. 1 On a total state basis, Industrial has 581 mobile customers, Daniels has 234 and Mountain Bell has 393; the record also shows that on a total state basis, Industrial has 18 channels, Daniels has 23 and Mountain Bell has 16. Industrial testified that Mountain Bell's share of the Salt Lake City area market was 30 to 40 percent. In addition, the evidence demonstrated that SMRs have the capability of offering services equivalent to the mobile services offered by Mountain Bell, Daniels, and Industrial and that SMRs are operating in the Salt Lake City area. The record also shows that Cellular carriers in the Salt Lake City are are in operation and that they are serving numerous customers.

4. The facts demonstrate that in the Salt Lake City area:

a. Mobile radio services are subject to effective competition.

b. Customers desiring such services have reasonable alternatives that are readily available to them.

c. No provider of such service serves a captive customer base.

5. In the Ogden area, functionally equivalent mobile radio service is offered to the public by Mountain Bell, Daniels, Industrial, NewVector, Salt Lake City Cellular and at least one SMR. While neither Daniels nor Industrial has radio channels in Ogden, their radio systems provide mobile service in the Ogden area through their transmitters located in the Oquirrh Mountains. Both Industrial and Daniels are certificated to serve the Ogden area and both hold themselves out through advertisements as providing mobile service in the Ogden area. Through their tariffs, both Industrial and Daniels are obligated to provide service to customers requesting such service in the Ogden area.

6. The facts demonstrate that in the Ogden area:

a. Mobile radio services are subject to effective competition.

b. Customers desiring such services have reasonable alternatives that are readily available to them.

c. No provider of such service serves a captive customer base.

7. In the Provo area, functionally equivalent mobile radio service is offered to the public by Mountain Bell, Daniels, Industrial, and at least one SMR. While neither Daniels nor Industrial has radio channels in Provo, their radio systems

provide mobile service in the Provo area through their transmitters located in the Oquirrh Mountains. Both Industrial and Daniels are certificated to serve the Provo area and both hold themselves out through advertisements as providing mobile service in the Provo area. Through their tariffs, both Industrial and Daniels are obligated to provide service to customers requesting such service in the Provo area. We are also aware that cellular service will also be offered in Provo in the future.

8. The facts demonstrate that in the Provo area:

a. Mobile radio services are subject to effective competition.

b. Customers desiring such services have reasonable alternatives that are readily available to them.

c. No provider of such service serves a captive customer base.

9. In the Vernal area, functionally equivalent mobile radio service is offered to the public by Mountain Bell, Industrial as well as two SMR providers. In Vernal, Mountain Bell has four radio channels and Industrial has seven. The testimony indicated that the market in Vernal was split fairly evenly between Industrial and Mountain Bell.

10. The facts demonstrate that in the Vernal area:

a. Mobile radio services are subject to effective competition.

b. Customers desiring such services have reasonable alternatives that are readily available to them.

c. No provider of such service serves a captive customer base.

11. In the Price area, functionally equivalent mobile radio service is offered by Mountain Bell and by Royce's Electronics. Royce's Electronics is a certificated mobile carrier in the Price area and holds itself out as providing such services in that area.

12. The facts demonstrate that in the Price area:

a. Mobile radio services are subject to effective competition.

b. Customers desiring such services have reasonable alternatives that are readily available to them.

c. No provider of such service serves a captive customer base.

13. In the Moab and Monticello areas, functionally equivalent mobile radio service is offered by Continental Telephone and Royce's Electronics. Both are certificated mobile carriers who hold themselves out as providing such services in those areas.

14. The facts demonstrate that in the Moab and Monticello areas:

a. Mobile radio services are subject to effective competition.

b. Customers desiring such services have reasonable alternatives that are readily available to them.

c. No provider of such service serves a captive customer base.

15. As to all of the areas above listed, we find that exempting mobile radio service from the requirements of filing and gaining prior approval of rate levels is in the public interest. In so concluding we note that the facts in the record demonstrate that:

a. In each of these market areas, there are at least two separate entities offering similar services.

b. In each of these areas, customers and potential customers can choose between one or more providers. Even though in the Ogden and Provo areas Industrial and Mobile claim they have no customers, they also acknowledged that they have not attempted to actively market in those areas. Nevertheless, they do serve those areas and are obligated to serve. In Ogden, cellular service is provided by NewVector and Salt Lake City Cellular. Cellular licenses have been granted in the Provo area to two companies. There is no evidence that Mountain Bell has the kind of market power that would allow it to dictate whatever price it chooses. In all the other areas, it was clear that no one entity dominated either market share or has market power. Just examining the number of mobile customers served by each provider makes it clear that no one entity has either a dominant market share or market power. Mountain Bell, the

applicant in this matter, has fewer mobile customers than Industrial. Mountain Bell has fewer radio channels than either Daniels or Industrial.

c. SMR providers, RCCs, WCCs, Cellular providers and private systems all provide mobile radio services that are functionally equivalent -- all provide interconnection to the public switched network for mobile customers. While the rate structures of the various players in each market vary somewhat, they are generally offered at competitive rates, terms and conditions.

d. Detariffing of rate levels will not adversely affect the regulated revenue requirements of Mountain Bell. Indeed, the purpose of exemption is to allow it the opportunity to remain viable in the marketplace.

e. There are no legal barriers of entry to become a provider of mobile services. SMR providers may enter the market without legal restriction. Although the matter is currently on appeal, the FCC recently issued an order in Docket No. 85-89 reempting state regulation of entry into the mobile radio marketplace. Furthermore, we find no prohibitive financial burden to enter the market. The recent entry of new providers of such service demonstrates the ease of market entry.

f. The mobile radio service market is an expanding one. Virtually all providers are expanding their number of available channels. The facts indicate that

the current providers of such services are financially sound.

g. As part of our regulatory oversight, we must assure that the mobile service of Mountain Bell or other carriers is not subsidized by other regulated services. Mountain Bell has committed to provide its mobile services above its direct costs. As part of our regulatory oversight role in the ratemaking process for Mountain Bell's regulated services, we will, in future ratemaking proceedings, assure ourselves that these commitments are met. While cost may be a relevant factor in our ongoing oversight role, we do not believe it is necessary or relevant that we review specific cost data to determine whether exemption should be allowed, since, as Dr. Compton correctly points out, if it can be shown that a market is competitive "a regulatory decision to grant pricing flexibility requires no specific knowledge about the providers' costs."

h. While it is impossible to predict the effect exemption will have on existing suppliers, it is reasonable to believe that detariffing will result in declining prices. How this will affect other suppliers will depend on how each responds in the competitive marketplace. We have no reason to believe that detariffing will result in any provider gaining dominance in the market. Dr. Compton testified that in his opinion

Mountain Bell will have no incentive to engage in anticompetitive pricing because of the Commission's continuing regulatory oversight of its costs and revenues in connection with ratemaking and because of potential liability under the federal antitrust laws.

i. Detariffing will provide positive benefits to customers. By explicitly allowing price competition in the areas set forth above, we believe the result will be better service at competitive rates. To the extent detariffing results in adverse public impacts, we will not hesitate to consider re-regulation.

16. Based on all the facts in the record, the Commission concludes that detariffing of mobile rates in the seven areas will promote competitive pricing conditions that are just and reasonable. Detariffing is therefore in the public interest.

17. Rural radio service is utilized to provide the final link of a customer's service by radio link rather than through wire.

18. Rural radio service, while provided via radio, is more closely akin to basic exchange service than to mobile service. We are not convinced on the basis of this record that there is sufficient competition for the provision of such service and therefore decline to detariff rates for the service at this time.

## CONCLUSIONS OF LAW

1. Our conclusions regarding §§ 54-8b-1 et seq. contained in the General Discussion section of this Report and Order are hereby incorporated herein by reference.

2. The Commission concludes that as to Moab, Monticello, Ogden, Salt Lake City, Provo, Price, Vernal and their surrounding areas, there is effective competition for the provision of mobile telephone service, that customers have reasonably available alternatives, that suppliers do not service captive customer bases and that detariffing of rates is in the public interest.

3. As to rural radio services, the Commission concludes that the service does not meet the requirements of Utah Code Ann. §54-8b-3(2).

## ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That:

1. Effective immediately, regulated suppliers of mobile telephone service in the following cities and surrounding areas, may remove rate levels from their tariffs:

| | |
|---|---|
| Moab | Monticello |
| Ogden | Salt Lake City |
| Provo | Price |
| Vernal | |

Such suppliers need not seek prior approval of changes in rates for mobile telephone service.

2. Rate levels for rural radio service shall continue

to be tariffed and subject to all regulatory requirements of Title 54.

DATED at Salt Lake City, Utah, this 17th day of April, 1987.

/s/ Brian T. Stewart, Chairman

(SEAL)

/s/ Brent H. Cameron Commissioner

/s/ James M. Byrne, Commissioner

Attest:

/s/ Stephen C. Hewlett, Secretary

# COPY

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

AFFIDAVIT OF MAILING

| | |
|---|---|
| In the Matter of the Petition of THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY for Exemption from Regulation of Mobile Radio Service and Rural Radio Service. | CASE NO. 85-999-19<br>CASE NO. 85-049-09<br><br>REPORT AND ORDER |

County of Salt Lake )
) ss.
State of Utah )

Brenda Warner, being duly sworn, deposes and says that she is a secretary regularly employed in the office of the Public Service Commission of Utah, whose office is located at 160 East 300 South, Fourth Floor, Heber M. Wells State Office Building, Salt Lake City, Utah.

That there is a United States Post Office at Salt Lake City, and at the place of residence or place of business of the persons whose names are set forth below; and between Salt Lake City and residence or places of business, there is a regular communication by mail.

That on the 17th day of April, 1987, affiant served a true copy of the hereto attached REPORT AND ORDER on the said persons by mailing such copy on said date in a post office in Salt Lake City, Utah, properly enclosed in a sealed envelope with postage prepaid thereon, legibly addressed to the following persons, at the addresses shown:

* Gregory B. Monson, Esq.
310 SouthMain
SLC, UT 84101

* Kenneth R. Madsen
Ted Smith
Mountain Bell
250 Bell Plaza, Rm 1610
SLC, UT 84111

Also attached mailing list

Subscribed and sworn to before me this 17th day of April, 1987.

Secretary

original in 85-999-19

My Commission Expires
July 15, 1990

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Residing at Salt Lake City, Utah

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APPENDIX "B"

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

* * * * * * * *

| | | |
|---|---|---|
| In the Matter of the Petition of THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY for Exemption from Regulation of Mobile Radio Service and Rural Radio Service | ) | Case Nos. 85-049-09; 85-999-19 |
| | ) | PETITION FOR REVIEW AND REHEARING |

* * * * * * * *

David R. Williams, dba Industrial Communications ("Industrial"), intervenor and protestant in the above-entitled matter respectfully petitions the Commission to review, rehear, and upon review and rehearing, to reverse the Report and Order issued in the above-entitled matter dated April 17, 1987. Petitioner asserts that this Petition should be granted because the Report and Order is erroneous as a matter of law for the following reasons:

1. The Commission misinterpreted and misapplied the provisions of Utah Code Annotated § 54-8(b)-3.

2. The Commission erred at hearing by receiving in evidence written testimony, oral testimony and exhibits sponsored by James H. Murphy, by refusing to strike the same and by basing findings of fact thereon.

3. Findings of Fact set forth in the Report and Order numbered 2,3,5,6,7,8,9,10,14,15 and 16 are not supported by the record and are erroneous as a matter of law.

4. Conclusions stated by the Commission in the section of the Report and Order titled "General Discussion" together with Conclusions of Law numbered 1 and 2 are erroneous as a matter of law.

## ARGUMENT IN SUPPORT OF PETITION

### I. THE COMMISSION MISINTERPRETED AND MISAPPLIED THE PROVISIONS OF UTAH CODE ANNOTATED § 54-8(b)-3

Utah Code Annotated § 54-8(b)-3 provides in the first full paragraph of subsection (2) that an order issued by the Commission under the power vested by the statute must be supported by four specifically designated findings of fact. After so providing, subsection (2) then states that in making those findings the Commission must consider all relevant factors. "Relevant factors" are defined in that paragraph to include, but not to be limited to, specifically designed factors, some of which were ignored completely by the Commission in this proceeding because no evidence was produced regarding the same by the Commission itself or any party to the proceeding. That paragraph reads as follows:

> In determining whether to exempt any telecommunications corporation or public telecommunications service from any requirement of this title, the commission shall consider

> all relevant factors including, but not limited to: (a) the number of other providers offering similar services; (b) the intrastate market power and market share within the state of Utah of the telecommunications corporation requesting an exemption; (c) the intrastate market power and market share of other providers; (d) the existence of other providers to make functionally equivalent services readily available at competitive rates, terms, and conditions; (e) the effect of exemption on the regulated revenue requirements of the telecommunications corporation requesting an exemption; (f) the ease of entry of other providers into the marketplace; (g) the overall impact of exemption on the public interest; (h) the integrity of all service providers in the proposed market; (i) the cost of providing such service; (j) the economic impact on existing telecommunications corporation; and (k) whether competition will promote the provision of adequate services at just and reasonable rates. (Emphasis added).

At pp. 8 and 9 of the Report and Order the Commission badly misconstrues the interpretation of Utah Code Annotated § 54-8(b)-3 which was urged by Williams at the hearing. The position of Williams was and is that the four findings designated in the first full paragraph of subsection (2) of this statute are mandatory; that no specific findings need be made with regard to defined "relevant factors" numbered (a) through (k); but that the Commission must consider each of those enumerated factors in making the required findings of fact. The statute specifically so states. It follows that if neither the Commission nor any party to the proceedings offers any evidence whatsoever regarding

one or more of those "relevant factors," and the Commission, nonetheless, purports to enter an order pursuant to the authority granted by the statute, it will not act in conformance with the provisions of the statute. It did not so act here.

Illustrative of the Commission's error is "relevant factor" (i) "the cost of providing such service." That factor, in addition to being defined by the statute as a required "relevant factor", is of particular importance here because the applicant (Mtn. Bell) seeks to remove from regulation by the Commission its pricing of this service. The operating witness which it sponsored at the hearing admitted that Mtn. Bell had available cost studies and could have produced and presented evidence of its cost of service but refrained from doing so and refused to answer questions on this subject. (TR. 41, 97-8)

Instead of requiring evidence of applicant's "cost of services" so that this "relevant factor" could be considered in making its necessary findings of fact, the Commission determined that this particular factor was not "relevant" in this case. At page 17 of the Report and Order the Commission stated that in this case cost is neither "necessary" nor "relevant". In so holding, the Commission relied upon the testimony of Dr. Compton who stated that "a regulatory decision to grant pricing flexibility requires no specific knowledge about the provider's cost." With all due respect to Dr. Compton's opinion, and

without arguing whether or not his opinion has any merit, suffice it to say that both he and the Commission have substituted their wisdom for that of the Utah Legislature. The Legislature has mandated a consideration of this factor.

The Commission likewise, and we assume for similar reasons, failed to give due consideration to "relevant factors" numbered (b),(c),(d),(e),(g),(j) and (k). These errors require review, rehearing and reversal.

II. THE COMMISSION ERRED AT HEARING BY RECEIVING IN EVIDENCE WRITTEN TESTIMONY, ORAL TESTIMONY AND EXHIBITS SPONSORED BY JAMES H. MURPHY, BY REFUSING TO STRIKE THE SAME AND BY BASING FINDS OF FACT THEREON

The applicant at hearing sponsored written testimony, oral testimony and exhibits through its operating witness James H. Murphy. To the extent that such "evidence" is material to any of the issues in this proceeding, it is almost wholly comprised of inadmissible speculation and conclusions without any foundation whatsoever or based upon various types of hearsay. The Commission overruled appropriate objections to this testimony and denied motions to strike the same. (TR. 21,58,61-3,94,117) Nonetheless, it premised critical and necessary findings thereon.

Commissioner Cameron stated as follows with respect to the "hearsay" aspect of Mr. Murphy's testimony: (TR. 29-30) "Hearsay evidence is admissible in Utah in administrative

hearings. It cannot be relied on solely for a finding of fact or conclusion by the Commission".

We do not argue with this statement. However, Mr. Murphy's "hearsay" is "solely" the basis of some of the Commission's findings and conclusions. And, even more troublesome, some of the Commission's findings and conclusions are based upon Murphy's pure speculations and conclusions which were, admittedly, lacking in any foundation whatsoever. They were not even supported by "hearsay" material but were plucked from the air. By way of example, but not of limitation, Mr. Murphy speculated and concluded that SMRs provided functionally equivalent mobile telephone service to that offered by the applicant and by Williams. This factual information is critical because the legislature in its wisdom has mandated that the commission "shall" consider, among other things, before issuing an order under the provisions of Utah Code Annotated § 54-8(b)-1, as one of the "relevant factors" the "existence of other providers to make <u>functionally equivalent services readily available at competitive rates, terms and conditions"</u> (emphasis added).

Despite the fact that Mr. Murphy conceded on cross examination that he was not familiar with a single SMR in Utah or the services which it provided (TR. 32), the Commission erroneously accepted and relied upon his conclusions as to

functional equivalency of services. If the Commission is at liberty to premise findings of fact upon such completely unfounded speculation it may as well dispense with hearings altogether because they become absolutely meaningless.

We respectfully submit that the commission erred as a matter of law by receiving such speculation in the first place, by refusing to strike the same from the record and then by relying upon the same to underpin critical fact considerations and findings required by the legislature.

## III. FINDINGS OF FACT SET FORTH IN THE REPORT AND ORDER NUMBERED 2, 3, 5, 6, 7, 8, 9, 10, 14, 15 AND 16 ARE NOT SUPPORTED BY THE RECORD AND ARE ERRONEOUS AS A MATTER OF LAW

In making its "Findings of Fact", the Commission went beyond the statutory mandated four specific findings. However, it is important to review those findings which it did make because they obviously underpin the ultimate conclusions reached by the Commission in its Report and Order.

1. We first invite the attention of the Commission to Finding of Fact number 2 at pages ten and eleven. The first sentence of that Finding reads "several types of entities offer functionally equivalent types of mobile radio service". (emphasis added). A central underpending finding of this paragraph is that "specialized mobile radio (SMR) providers"

offer a "functionally equivalent" service. Functionally equivalent service as specifically defined by statute. In the second full paragraph of Utah Code Annotated § 54-8(b)-3 (2) this term is defined as a service which is at "functionally equivalent" and "readily available at competitive rates, terms, and conditions." It is respectfully submitted that the only "evidence" upon which this "Finding of Fact" could be premised is the diseased testimony of Mr. Murphy which is addressed above and which could not possible underpin such a finding. Murphy admittedly had no knowledge or information relating to either the identity of or the services offered by any SMR offering a service in Utah! The findings as to each of the designated areas that SMRs offer a "functionally equivalent service" are erroneous on their face. The record is absolutely barren of any evidence upon which the necessary further examination could be made to ascertain whether or not such services were "readily available at competitive rates, terms and conditions." Indeed, there is no evidence on this record relating to their rates and the uncontroverted evidence demonstrates that their terms and conditions of service are completely different. In fact, none of those SMRs is even regulated by this Commission.

Dr. Compton addressed this subject in his testimony. He stated (controverted only by Murphy's bootstrapped and unsupported speculations) that "SMRs may or may not be effective

competition depending upon how open they are". (TR. 169) Mr. Burnett, counsel who sponsored Division witnesses Capshaw and Compton admitted, in response to specific inquiry by Commissioner Cameron as to whether or not SMRs are "effective competition" stated: (TR. 170)

MR. BURNETT: Well, I think what Mr. Capshaw said is you need to make an evaluation of that but absent that evaluation which we didn't feel like we had in this proceeding, particularly for each individual town or municipality or area, we did know as a matter of record or as a matter of personal knowledge that we had more than one regulated carrier in each of these towns, but if you were going to make an analysis in other towns where perhaps you had a -- some competition between SMR's or competition between an SMR and an RCC that evaluation hasn't been made.

COM. CAMERON: So the Division is not making a recommendaiton --

MR. BURNETT: -- that we should include SMR's as competition; is that --

MR. BURNETT: Well, I think that would require a further proceeding.

2. Similarly, the statement in Finding of Fact number 3, that SMR providers in Salt Lake City offer "functionally equivalent" mobile services is erroneous as a matter of law. The additional critical finding made here by the Commission that "New

Vector" and "Salt Lake City Cellular" also offer a "functionally equivalent" service is without support in the evidence. Admittedly, Salt Lake City Cellular had not even entered the market and offered no services at all at the date of the hearing. (TR 60) Under the applicable statute, to be "functionally equivalent", the service must "readily available at competitive rates, terms and conditions". Under this test, the kind of service offered to the public by New Vector is not "functionally equivalent" because costs are from 600 to 700 percent more than for IMTS service now offered by the regulated carriers. This type of service has some advantages and some disadvantages to the presently available regulated service, but certainly is not "functionally equivalent". (TR. 246)

3. Findings in Finding of Fact number 5 at page 12 that SMRs, New Vector and Salt Lake Cellular offer "functionally equivalent mobile radio service" is similarly erroneous.

4. Each of the specific Findings of Fact contained in paragraph 6 at page 12 is similarly erroneous, not supported by evidence, and contrary to the uncontroverted evidence. As a matter of fact, Mtn. Bell has 100% of the Ogden market. It has a captive customer base. Customers have no competitive alternative available for them whatsoever. Although, Industrial has authority from this Commission to service the area, it cannot do so competitively because customers in Ogden desiring to call

mobile units in Ogden have to pay a long distance charge when dealing with industrial which is not true with Mtn. Bell. This explains why Mtn. Bell has 100% of the market. No other service is competitive at all (TR. 241).

5. Findings of Fact number 7 at pages 12-13 is similarly erroneous. In the Provo area, Mtn. Bell has 100% of the market because none of the regulated carriers can offer a complete service without imposing a long distance charge. Mtn. Bell services a captive customer base where no reasonable alternative service is available to them which is "readily available at competitive rates, terms and conditions". (TR. 235, 238)

6. The Findings of Fact contained in paragraph 8 at page 13 similarly are totally erroneous regarding service available in the Provo area.

7. The Findings of Fact contained in paragraph 9 at pages 13 and 14 are erroneous in that they find that SMRs in the Vernal area offer a "functionally equivalent" service and that mobile radio services are subject to effective competition in that area. Industrial is the only arguable competitor of Mtn. Bell in the Vernal area. However, it is uncontroverted that Mtn. Bell has a distinct and unfair competitive advantage in Vernal because all of its services are automated and the industrial competitive service is manual. Industrial could convert its

service to a competitive automated service, but only with the cooperation with Mtn. Bell, which to the date of hearing it has refused to give. (TR. 291-3)

8. Similarly, the Findings of Fact set forth in paragraph 10 at pages 13 and 14 are wholly unsupported by evidence and contrary to the uncontroverted evidence with respect to services available in the Vernal area.

9. Similarly, the Findings of Fact set forth in paragraph 14 at pages 14 and 15 are not supported by evidence and are contrary to uncontroverted evidence of record.

10. Findings of Fact number 15 at pages 15-18 contain numerous erroneous findings which duplicate those already addressed above. By way of illustration, but not of exclusion, we invite the attention to the Commission of specific findings set forth in this paragraph, not heretofore addressed, and which are wholly erroneous on this record on a matter of law:

(a) Statement at page 15 that "there is no evidence that Mountain Bell has the kind of market power that would allow it to dictate whatever price it chooses". This wholly erroneous finding is of specific importance because the second full paragraph of subsection (2) of Utah Code Annotated § 54-8(b)-3 mandates the consideration of these very factors. Applicants own operating witness admitted that "the resources are there" and the "ability is there" for Mtn. Bell to dictate whatever price it

chooses and to drive the competition right out of business. In addition, Mr. Kapshaw conceded on cross examination that Mtn. Bell and Cellular, (a sister company) could have the staying power to set rates where they could get rid of both Mobile and Industrial and have the entire market to themselves. (TR. 148)

(b) Statements contained in the last two full sentences at page 15 to the effect that no one entity dominated market share or has market power demonstrated by the number of customers served by each provider. These statements generalize Mobile Radio Service throughout the state of Utah. This simply cannot be done because of the local nature of the markets (TR. 249). This statement is not supported by any evidence whatsoever with respect to many of the service areas in the state of Utah where a single provider of service is available (see e.g., Wendover, Utah where Mtn. Bell is the only supplier) (TR. 43). (See also the Ogden and Provo areas where Mtn. Bell has 100 percent of the market.)

(c) At page 16 the Commission states that the FCC in Docket No. 8589 preempts state regulation. In point of fact, that ruling has been reversed by the federal court.

(d) At page 16 in the last full paragraph of paragraph designated e., the Commission states there is no prohibitive financial burden to enter the market. This statement is unsupported by evidence of record and is contrary to

uncontroverted evidence of record. For example, Mr. Capshaw testified that it would cost tens of thousands of dollars to enter the market in the local rural areas and that, in his opinion, there will never be competition in small towns because of the small volume of customers and the difficulty with terrain (TR. 142, 152). Dr. Compton testified that it would cost hundreds of thousands of dollars to enter the market place in Salt Lake City (TR. 222).

11. Finding of Fact number 16 at page 18 is in fact a Conclusion of Law. As such it is erroneous as a matter of law.

IV. THE CONCLUSIONS STATED BY THE COMMISSION IN THE SECTION OF THE REPORT AND ORDER TITLED "GENERAL DISCUSSION" TOGETHER WITH CONCLUSION OF LAW NO. 1 AND 2 ARE ERRONEOUS AS A MATTER OF LAW.

These conclusions of law, coupled with those stated in Findings of Fact number 16 at page 18, are erroneous as a matter of law because of the erroneous fact findings that underpin them and because of the misconstruction and misapplication of the applicable statute by the Commission discussed above.

## CONCLUSION

For all of the foregoing reasons, the Commission should review the report and order in this matter and grant a rehearing therein. Following review and rehearing, the order should be set aside in its entirety and the application of Mtn. Bell for relief, together with the related generic proceeding, should be

dismissed. As noted above, the Commission has failed to give consideration to factors mandated for consideration by the Legislature. It has not produced evidence itself, nor has it required other parties of record to produce evidence, regarding factors which must be reviewed to underpin an affirmative order under the applicable statute. The Commission has made specific findings of fact which underpin its Report and Order which are completely unsupported by evidence and which are contrary to uncontroverted evidence of record.

It follows that the report and order on file herein should be reviewed and withdrawn.

RESPECTFULLY SUBMITTED this 5th day of May, 1987.

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CERTIFICATE OF SERVICE

The foregoing Petition for Review and Rehearing was duly served upon all parties of record by mailing a true copy thereof to the following this 5th day of May, 1987:

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APPENDIX "C"

**54-8B-3. Commission jurisdiction over telecommunications - Exemptions from title allowed - Hearings and findings - Approval period.**

(1) The commission is vested with power and jurisdiction to partially or wholly exempt from any requirement of this title any telecommunications corporation or public telecommunications service in this state.

(2) The commission, on its own initiative or in response to an application by a telecommunications corporation or a user of a public telecommunications service, may, after public notice and an opportunity for a hearing, make findings and issue an order specifying its requirements, terms, and conditions exempting any telecommunications corporation or any public telecommunications service from any requirement of this title either for a specific geographic area or in the entire state if the commission finds that the telecommunications corporation or service is subject to effective competition, that customers of the telecommunications corporation or service have reasonably available alternatives, and that the telecommunications corporation or service does not serve a captive customer base, and if such exemption is in the public interest of the citizens of the state. In determining whether to exempt any telecommunications corporation or public telecommunications service from any requirement of this title, the commission shall consider all relevant factors including, but not limited to: (a) the number of other providers offering similar services; (b) the intrastate market power and market share within the state of Utah of the telecommunications corporation requesting an exemption; (c) the intrastate market power and market share of other providers; (d) the existence of other providers to make functionally equivalent services readily available at competitive rates,

terms, and conditions; (e) the effect of exemption on the regulated revenue requirements of the telecommunications corporation requesting an exemption; (f) the ease of entry of other providers into the marketplace; (g) the overall impact of exemption on the public interest; (h) the integrity of all service providers in the proposed market; (i) the cost of providing such service; (j) the economic impact on existing telecommunications corporations; and (k) whether competition will promote the provision of adequate services at just and reasonable rates.

(3) The commission shall approve or deny any application for exemption under this section within 240 days, except that the commission may by order defer action for an additional 30-day period. If the commission has not acted on any application within the permitted time period, the application shall be deemed granted.